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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1933.

No. 27.

STATE OF MISSOURI et al., Petitioners,

vs.

JOHANNA F. FISKE et al., Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR THE RESPONDENTS.

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BRIEF FOR THE RESPONDENTS.

STATEMENT FOR THE RESPONDENTS.

This case comes before the Court on a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Eighth Circuit in the case of Johanna F. Fiske et al. v. State of Missouri et al. (R. 23), which was handed down on November 26, 1932 (R. 37) and is reported in 62 Fed. (2d) 150. The Circuit Court of Ap-

peals reversed an order of the United States District Court for the Eastern District of Missouri (R. 17) dismissing the ancillary bill (R. 6) filed by the respondents herein, seeking to enjoin the State of Missouri from attempting to obtain in its own courts orders, judgments and decrees contrary to those which had been entered by the federal courts in the main litigation over a period of years, beginning with its inception in the District Court at St. Louis in March, 1924. Since that time numerous phases of the case have received the attention of the trial court and many have been passed upon by the Circuit Court of Appeals. If desired, the history of the litigation may be reviewed by referring to the following opinions of the Circuit Court of Appeals:

Franz et al. v. Buder, 11 Fed. (2nd) 854 and 858;
Franz v. Franz, 15 Fed. (2nd) 797;
Buder et al. v. Franz et al., 27 Fed. (2nd) 101;
Mississippi Valley Trust Co. v. Buder et al., 34 Fed. (2nd) 353;
Franz v. Buder, 34 Fed. (2nd) 353;
Franz v. Buder et al., 38 Fed. (2nd) 605;
Mississippi Valley Trust Co. v. Buder et al., 47 Fed. (2nd) 507;
Mississippi Valley Trust Company v. Franz, 51 Fed. (2nd) 1047.

The present respondents, Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmermann and Otto B. Franz, have been parties to the litigation

since the filing of the amended bill of complaint on March 30, 1926. They are five of the ten remaindermen mentioned in the last will and testament of their deceased father, who died in 1898 (27 Fed. [2nd], l. c. 103).

Petitioner, State of Missouri, not theretofore a party to the suit, filed its motion in the United States District Court for leave to intervene as a party defendant in the principal case on June 1, 1931 (R. 2), and obtained an order granting its application for leave to so intervene as a defendant (R. 1-2). The alleged interest of the State as a claimant of inheritance taxes is advanced as the basis for its intervention.

The main points at issue in the Franz estate litigation were decided in Buder et al. v. Franz et al., 27 Fed. (2nd) 101, it being there decided that the remainder interests, created by and granted under the will of Ehrhardt D. Franz, deceased (27 Fed. [2nd], l. c. 103), were still in existence, and that certain stock dividends of the Burroughs Adding Machine Company were corpus inuring to the benefit of such remainder interests and did not belong to the life tenant, Sophie Franz.

Sophie Franz, the life tenant, died on April 14, 1930, leaving a will, which was duly probated in the Probate Court of the City of St. Louis, Missouri, in which will she named as her executor C. A. Buder, who has duly qualified and is now so acting (R. 5, 10).

In due time the said executor of the estate of Sophie Franz, deceased, filed in the Probate Court of the City

of St. Louis his inventory in said estate, but in compliance with the opinion of the Circuit Court of Appeals in Buder v. Franz, 27 Fed. (2nd) 101, l. c. 114, did not include in said inventory any of the Burroughs Adding Machine stock adjudged to constitute a part of the estate of Ehrhardt D. Franz, deceased. Thereupon, Franklin Miller, Circuit Attorney of the City of St. Louis, one of the petitioners herein, filed on behalf of the State of Missouri, in said Probate Court, a citation to compel said executor to inventory as an asset of the estate of Sophie Franz, deceased, 188,333⅓ shares of no par value common stock of the Burroughs Adding Machine Company (held by the lower courts not to belong to said Sophie Franz [27 Fed. (2nd) 101]), in order that an inheritance tax might be assessed and collected on such stock as being a part of the estate of Sophie Franz, deceased (R. 2, 8).

Following the issuance of said citation the State of Missouri, through its representatives, filed a petition in the United States District Court for leave to intervene in the principal case "as a party defendant" to file proper pleading in opposition to the motion of Gustavus A. Buder and Gustav A. Franz, trustees, and Johanna F. Fiske, Amanda F. Wheeler, Otto B. Franz, Henrietta Holdoway, Adelaide Zimmermann, Sherman H. Kleinschmidt and Helen Kleinschmidt" for distribution of said estate (R. 4). The prayer of said petition is "that an order be entered making the State of Missouri a party defendant herein" (R. 4).

Pursuant to such prayer the United States District Court granted said petition and entered its order allowing the State of Missouri the right to so intervene (R. 1-2).

Thereupon the said intervening petition of the State of Missouri was filed on the 6th day of June, 1931, in which petition it is alleged that "the State of Missouri, since the date of the death of said Sophie Franz, to wit, May 13, 1930, has had and now has a lien upon said stock for said taxes," and praying that a portion of said stock be transferred by the trustees to the registry of the District Court for the protection of said lien (R. 4, 5, 6).

Thereafter, on June 10, 1931, respondents herein filed in said District Court their ancillary and supplemental bill of complaint for an injunction (R. 6), whereby they sought to restrain the State of Missouri and its representatives from prosecuting in the Probate Court of the City of St. Louis the aforementioned application to require the executor of Sophie Franz to inventory the above-mentioned Burroughs Adding Machine stock as an asset of her estate (R. 8, 9). Said ancillary bill had for its purpose the protection and preservation of the jurisdiction of the District Court (R. 9), as had been done in Franz v. Franz, 15 Fed. (2nd) 797.

Appellants also answered the State's intervening petition on June 15, 1931 (R. 9).

The State moved, on June 29, 1931, to dismiss the ancillary and supplemental bill for an injunction filed by respondents herein (R. 12). On November 2, 1931, said

motion to dismiss was sustained (R. 14), an oral opinion being delivered, a memorandum of which was later filed (R. 15).

The said motion to dismiss was sustained solely upon the ground that the State of Missouri, as a sovereign power, was not subject to the injunctive process of the District Court. The matter was disposed of on the pleadings alone, no testimony having at any time been heard on the ancillary bill. The plaintiffs in the ancillary bill (these respondents) having declined to plead further, the Court, on December 3, 1931, dismissed their cause of action for an injunction and rendered a final judgment in favor of the defendants in the ancillary bill (R. 17).

Thereupon an appeal was duly allowed to the Circuit Court of Appeals for the Eighth Circuit (R. 18), which appeal resulted in the opinion and decree herein complained of by the petitioners.

SUMMARY OF THE ARGUMENT.

I.

Where a court of the United States is acting in a manner ancillary to a decree which it has rendered in a cause over which it had jurisdiction, the Eleventh Amendment to the Constitution of the United States does not prohibit or prevent the court from granting relief against a state.

Gunter v. Atlantic Coast Line Rd. Co., 200 U. S. 273, l. c. 292;
Prout v. Starr, 188 U. S. 537, l. c. 544.

II.

In construing a provision of the Constitution the court should inquire into and consider the origin of the provision and the history of the period during which it was enacted in order to determine its true purpose.

Prigg v. Pennsylvania, 16 Peters 539, l. c. 610-611;
Rhode Island v. Massachusetts, 12 Peters 657, l. c. 723;
Knowlton v. Moore, 178 U. S. 41, l. c. 95;
South Carolina v. United States, 199 U. S. 437, l. c. 456-7;
Legal Tender Cases, 12 Wallace 457, l. c. 560.

III.

The purpose and intent of the Eleventh Amendment to the Constitution of the United States was only to prevent

the courts of the United States from rendering money judgments against the respective states in favor of private individuals. It was not conceived to deprive the federal courts of jurisdiction over the respective states.

Cohens v. Virginia, 6 Wheaton 264, l. c. 406-7;
Charles Warren on "The Supreme Court in United States History," Vol. 1, pp. 93-102.

IV.

When a party intervenes in litigation, he does so in recognition of the jurisdiction of the court and the propriety of all orders and rulings of the court prior to the intervention.

French v. Capen, 105 U. S. 509, l. c. 525;
Commercial Electrical Supply Co. v. Curtis et al., 288 Fed. 657, l. c. 659;
Rice et al. v. Durham Water Co., 91 Fed. 433, l. c. 434.

V.

The removal of a case to the Supreme Court of the United States for review of a judgment in favor of a state does not constitute the commencement or prosecution of a suit against the state within the meaning of the Eleventh Amendment to the Constitution of the United States.

Cohens v. Virginia, 6 Wheaton 264, l. c. 409-410.

VI.

A constitution declares broad and general fundamental principles and should not be interpreted with the strictness of a private contract, but should receive a construction which is just and sensible and designed to accomplish the purpose for which the provision was enacted.

Juilliard v. Greenman (Legal Tender Case), 110 U. S. 421, l. c. 439;
In re Chapman, 166 U. S. 661, l. c. 667;
Lau Ow Bew v. United States, 144 U. S. 47, l. c. 59;
Williams v. United States Fidelity & Guaranty Co., 236 U. S. 549, l. c. 555.

VII.

Where the entire record is before the Supreme Court on certiorari the respondent may, in order to sustain the judgment or decree of the lower court, invoke the grounds which were decided against the respondent by the lower court, as well as those which were decided in his favor.

Story Parchment Company v. Paterson Parchment Paper Company et al., 282 U. S. 555, l. c. 560;
Langnes v. Green, 282 U. S. 531, l. c. 536-537.

VIII.

The Eleventh Amendment to the Constitution of the United States is not a mandatory or jurisdictional enact-

ment, but merely confers a personal privilege, which the state may waive by entering its voluntary appearance and submitting its rights to a federal court.

Clark v. Barnard et al., 108 U. S. 436, l. c. 447-448;
Gunter v. Atlantic Coast Line R. R. Co., 200 U. S. 273, l. c. 284, 291-292;
Cunningham v. Macon & Brunswick R. R. Co. et al., 109 U. S. 446, l. c. 451-452.

IX.

An intervenor must have a direct interest in or lien upon the property which is the subject matter of the suit in which he seeks to intervene, and such interest must be alleged and proved.

Smith v. Gale, 144 U. S. 509, l. c. 518-19;
Aronstam v. James et al., 273 Fed. 545, l. c. 547;
Glass v. Woodman et al., 223 Fed. 621.

X.

Where property is in the custody of a court, any question which arises concerning the right of a state to tax such property or to enforce a tax lien against it must be presented to and decided by the court having such custody.

In re Tyler, 149 U. S. 164, l. c. 182-3.

XI.

The main litigation, to which the present matter is ancillary, was in the nature of an action in rem, and the

property against which the State seeks to enforce its tax lien was and is within the custody of the District Court.

Franz v. Buder, 11 Fed. (2nd) 854, l. c. 859.

XII.

The Attorney-General of the State of Missouri had full and complete right, power and authority to enter the appearance of the State in this case and to waive the immunity of the State from suit in the federal court.

Section 590, R. S. Mo. 1929;
Section 11276, R. S. Mo. 1929.

(a) The question of whether or not a state has given one of its officers the power and authority to waive its immunity from suit in the federal court under the Eleventh Amendment to the Constitution of the United States must be determined by the local law of that particular state.

Palmer v. State of Ohio, 248 U. S. 32;
O'Conner v. Slaker, 22 Fed. (2nd) 147, l. c. 152-3.

(b) A statute having special reference to the subject matter involved in a suit and conferring power upon one of its officials to appear for and represent the State in that matter is sufficient to bind the State to a waiver of immunity by reason of an act done by such official under the terms of such statute.

Bow v. Plummer, 79 N. H. 23, l. c. 25.

XIII.

While the state courts and the courts of the United States have concurrent jurisdiction, they are parts of entirely separate systems of jurisprudence, as much as the courts of two foreign sovereign powers, and neither should interfere with the jurisdiction of the other, especially where one has acquired jurisdiction over, or custody of, specific property.

Covell v. Heyman, 111 U. S. 176, l. c. 182-3;
Ponzi v. Fessenden et al., 258 U. S. 254, l. c. 260-261.

XIV.

In the State of Missouri stock dividends are held to be corpus, and not income.

Hayes v. St. Louis Union Trust Company, 298 S. W. 91, l. c. 98.

ARGUMENT.

I. Eleventh Amendment.

The Circuit Court of Appeals held, contrary to the contentions of the petitioners, that the Eleventh Amendment to the Constitution of the United States did not prohibit the Court from issuing an injunction against the State of Missouri restraining it from prosecuting litigation in its own courts, which had for its purpose the nullifying of decrees previously entered by the federal court. In applying to this Court for the writ of certiorari, the State maintained that the foregoing question was one which had not been, but should be, settled by this Court. We respectfully desire to controvert that assertion, and in support of our position invoke:

Gunter v. Atlantic Coast Line Rd. Co., 200 U. S. 273, l. c. 292;
Prout v. Starr, 188 U. S. 537, l. c. 544.

In the Gunter case this Court said:

> "Indeed, the proposition that the Eleventh Amendment, or Section 720 of the Revised Statutes, control a court of the United States in administering relief, although the court was acting in a manner ancillary to a decree rendered in a cause over which it had jurisdiction, is not open for discussion (*Dietzsch v. Huidekoper*, 103 U. S. 494; *Prout v. Starr*, 188 U. S. 537; *Julian v. Central Trust Co.*, 193 U. S. 93, 112)."

The facts in Prout v. Starr were that after a suit involving certain railroad legislation of the State of Nebraska had been filed and was pending in the federal court, the Attorney-General of the State of Nebraska filed and endeavored to prosecute in the state courts an action involving the same subject matter. Thereupon, the original plaintiffs in the suit in the federal court filed their supplemental bill praying for an injunction against the Attorney-General restraining him from further prosecuting the action which he had filed in the state tribunal against the railway company. The Attorney-General "filed a demurrer on the ground that the bill was against the defendant in his official capacity as Attorney-General of the state, and was against the state, and that therefore the Court was, under the Eleventh Amendment of the Constitution, without jurisdiction." The demurrer was overruled and the injunction was issued as prayed. In affirming the case this Court said, at page 544:

> "The object of the supplemental bill was to restrain the present appellant, as successor to Smyth, from attempting to transfer the very matters that stood for judgment in the federal court to the state court by filing a bill in the latter. Such a course might bring about a conflict between those courts, and create the confusion so often deprecated by this court (*Peck v. Jenness*, 7 How. 612, 625; *Chittenden v. Brewster*, 2 Wall. 191; *Artow v. Smith*, 18 How. 263).
>
> "The jurisdiction of the Circuit Court could not be defeated or impaired by the institution, by one of the

parties, of subsequent proceedings, whether civil or criminal, involving the same legal questions, in the state court (*Harkrader v. Wadley*, 172 U. S. 148, 166)."

The petitioners, however, in their brief in support of the petition for the writ of certiorari herein, state that the purpose of the Eleventh Amendment was to overrule, in effect, the decision in Chisholm v. Georgia, 2 Dallas 419, which had held that a state was suable *in assumpsit* in the federal courts at the instance of a private individual. From this premise opposing counsel deduce that by virtue of the Amendment the federal courts were deprived of their power to proceed against a state in *all* suits against a state by an individual. That the purpose of the Eleventh Amendment was as stated by our adversaries, has many times been recognized by this Court, but the conclusion which they draw therefrom has never received the approval of this tribunal.

A cardinal rule of constitutional construction was expressed in Prigg v. Pennsylvania, 16 Peters 539, at pages 610-611, as follows:

> "It will, indeed, probably, be found, when we look to the character of the Constitution itself, the objects which it seeks to attain, the powers which it confers, the duties which it enjoins, and the rights which it secures, as well as the known historical fact that many of its provisions were matters of

compromise of opposing interests and opinions, that no uniform rule of interpretation can be applied to it, which might not allow, even if it does not positively demand, many modifications in its actual application to particular clauses. And, perhaps, the safest rule of interpretation after all will be found to be **to look to the nature and objects of the particular powers, duties and rights, with all the lights and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed.**" (Emphasis ours.)

To the same effect are:

Rhode Island v. Massachusetts, 12 Peters 657, l. c. 723;
Knowlton v. Moore, 178 U. S. 41, l. c. 95;
South Carolina v. United States, 199 U. S. 437, l. c. 456-7;
Legal Tender Cases, 12 Wallace 457, l. c. 560.

What were the political and financial conditions which obtained at the time of the adoption of the Eleventh Amendment and existed directly prior thereto? The Articles of Confederation had been adopted in 1777, the year following the Declaration of Independence. Due to the unsatisfactory experience under the Articles, a Constitution was framed in 1787 and the Government began under the Constitution on March 4, 1789. Within less than one year (September 25, 1789) Congress proposed

the first ten amendments to the Constitution as a limitation upon the powers of the Federal Government and they received the necessary ratification in 1791. The colonists had just passed the threshold of a new venture into self-government, and, because of lack of precedent, the most vexing and trying questions were constantly arising incident to the new experiment. Within the borders of the new country were many who, rightfully or wrongfully, were suspected of not being loyal to the new Republic. The respective state treasuries were anything but replete with funds, and any step which tended to strengthen the national powers as against the states was regarded with the most profound suspicion. State bankruptcy and the establishment of a monarchy in this country were the two menacing specters which constantly harassed the minds of the people. Having just fought and bled for their liberty, they were not willing to be deprived of it without a contest.

Under those circumstances and with such antecedents, the suit of Chisholm v. Georgia was filed to the August Term, 1792, immediately after the preliminary bulwarks had been thrown up to protect the individual states and their citizens against encroachment on the part of the Federal Government; and what was still more alarming, the action was one *in assumpsit*, which had for its purpose the recovery of a money judgment against the State of Georgia by the estate of a British subject. When the Judges of the Supreme Court rendered their opinions on February 18, 1793, the nation was aflame with indigna-

tion. Of such facts as these was the Eleventh Amendment born.

The situation as it then existed is admirably depicted by Charles Warren in his work entitled "The Supreme Court in United States History," volume 1, pages 93-102. The author recites, at pages 97 and 98, how the National Gazette of June 1, 1793, declared that "it must excite serious ideas in those who have from the beginning been inclined to suspect that the absorption of the State governments has long been a matter determined on by certain influential characters in this country who are aiming gradually at monarchy." At page 99 of the same work it is further stated:

> "While this opposition to the Court's decision was to some extent based on divergencies of political theories as to state sovereignty, the real source of the attack on the *Chisholm Case* was the very concrete fear of the 'numerous prosecutions that will immediately issue from the various claims of refugees, Tories, etc., that will introduce such a series of litigation as will throw every State in the Union into the greatest confusion.' In the crucial condition of the finances of most of the States at that time, only disaster was to be expected if suits could be successfully maintained by holders of State issues of paper and other credits, or by Loyalist refugees to recover property confiscated or sequestered by the states; and that this was no theoretical danger was shown by the immediate institution of such suits against the States in South Carolina, Georgia, Virginia and Massachusetts."

A consideration of the foregoing factors is, we submit, convincing proof that those who framed and sponsored the Eleventh Amendment had in mind a purpose which was much more just and worthy than later schemes in support of which the Eleventh Amendment has been invoked. It is glaringly apparent that the patriots of the Eighteenth Century who were responsible for the amendment never at any time even remotely contemplated that it should be used as a weapon of aggression to emasculate the decrees of a federal court properly entered in a suit between individuals of which said court had jurisdiction. That the representatives of the State of Missouri have no loftier object than this in view is quite evident from excerpts taken from the opinion of the Court of Appeals, which the representatives of the State seek to have this Court reverse. That Court accurately said (R. 31):

> "From this history of the main litigation it is clear that the rights and interests of these appellants in this stock were involved in and determined in the federal court. Therefore, it must be evident that the contemplated action of the State in the probate court must have the purpose to relitigate this very matter. Unless the State can there obtain a result directly opposed to the determination of the federal court, it will completely fail in its purpose. There could be no plainer case of interference with the jurisdiction of a court and defeat of its decrees entered within its jurisdiction."

Judge Stone, in the opinion, also stated (R. 33):

> "The situation here is that a State is seeking to have a federal court, which has full jurisdiction over a *res* and which has entered its final decrees fully adjudicating the rights of these appellants in that *res*, transfer to and hold in its registry the property representing the interests of appellants in that *res* until the State can relitigate, in its own courts, the very issues of interest and title already determined by the decrees of the federal court."

The truisms in regard to the Eleventh Amendment hereinbefore set forth were recognized by no less an authority than Chief Justice Marshall. That eminent jurist in the historic opinion in the case of Cohens v. Virginia, 6 Wheaton 264, observed at pages 406-407:

> "It is part of our history that, at the adoption of the Constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument. Suits were instituted; and the Court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress and adopted by the State Legislatures. That its motive was not to maintain the sovereignty of a state from the degredation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more states, or between a state and a foreign

state. The jurisdiction of the Court still extends to these cases; and in these a state may still be sued. We must ascribe the amendment then to some other cause than the dignity of a state. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a state, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister states would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by states.

"The first impression made on the mind is, that it was intended for those cases, and for those only, in which some demand against a state is made by an individual in the courts of the Union. If we consider the causes to which it is to be traced, we are conducted to the same conclusion. **A general interest might well be felt in leaving to a state the full power of consulting its convenience in the adjustment of its debts, or of other claims upon it; but no interest could be felt in so changing the relations between the whole and its parts, as to strip the Government of the means of protecting, by the instrumentality of its courts, the Constitution and laws from active violation.**" (Emphasis ours.)

The State, however, contends for a strict construction of the language of the Amendment; it maintains that the

words "the judicial power of the United States shall not be construed to extend," etc., strip a federal tribunal of all right to entertain any proceeding whatever against a state. Such position is untenable. As will definitely appear from the cases cited under topic II, ante, a federal court may always entertain a suit by an individual against one of the states if the state consents to be sued. This petitioners admit to be the law. But, as it is an unquestioned doctrine, that consent alone never confers jurisdiction, it must be entirely clear that the Amendment presents no jurisdictional question.

Granting for the sake of argument that the interpretation placed upon the Amendment by the State would be justified in an original proceeding for an injunction against the State, nevertheless it cannot be applied to a bill such as the present, which in its nature is strictly ancillary. It is axiomatic that the right of a federal court to hear and determine an ancillary proceeding attaches by virtue of its jurisdiction in the main or original litigation, and that, therefore, it is unnecessary to allege or prove any jurisdictional facts in the ancillary proceeding. Applying that legal maxim to the case at bar brings us to an appreciation of the fact that the jurisdiction here attached upon the filing of the original bill in March, 1924. When the state intervened in June, 1931 (R. 2, 4), it did so in recognition of that jurisdiction.

French v. Capen, 105 U. S. 509, l. c. 525;

Commercial Electrical Supply Co. v. Curtis et al., 288 Fed. 657, l. c. 659;
Rice et al. v. Durham Water Co., 91 Fed. 433, l. c. 434.

Consequently, the inherent right of the Court to protect and effectuate its decrees already rendered, even though the rights of the State were involved, related back to the date of the original proceeding, and were not determinable as of June 10, 1931, the date of the filing of the ancillary bill (R. 6). In brief, regardless of the construction placed upon the Eleventh Amendment, it could not destroy jurisdiction which was previously existent; the greatest effect that it could have was to withhold jurisdiction in a new proceeding.

The facts in the present case, while not identical, are analogous to those in the case of Cohens v. Virginia, supra. We again quote from the opinion by Justice Marshall (6 Wheaton, l. c. 409-410):

> "If a suit, brought in one court, and carried by legal process to a supervising court, be a continuation of the same suit, then this suit is not commenced nor prosecuted against a state. It is clearly, in its commencement, the suit of a state against an individual, which suit is transferred to this court, not for the purpose of asserting any claim against the state, but for the purpose of asserting a constitutional defense against a claim made by a state."

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"Where, then, a state obtains a judgment against an individual, and the Court rendering such judgment overrules a defense set up under the Constitution or laws of the United States, the transfer of this record into the Supreme Court for the sole purpose of inquiring whether the judgment violates the Constitution or laws of the United States, can with no propriety, we think, be denominated a suit commenced or prosecuted against the state whose judgment is so far reexamined. Nothing is demanded from the state. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of anything. Consequently, it is an appeal on a single point; and the defendant who appeals from a judgment rendered against him, is never said to commence or prosecute a suit against the plaintiff who has obtained the judgment."

Applying the reasoning of the Court in the Cohens case to the instant case, it may very properly be said that the filing of the ancillary bill for an injunction was not tantamount to a suit being "commenced" against the State, because the suit in which the bill was filed had been commenced years before. Likewise, the filing of the ancillary bill and the attempt of the respondents to proceed thereon was not equivalent to a suit being "prosecuted" against the State for the reason that the suit had already been prosecuted against the individual defendants prior to the State coming into the case and prior to the filing of the ancillary bill. In other words, we contend that an ancillary bill filed in a previously existent case is no more of a

separate suit or proceeding than is the taking of an appeal in a previously existent case; both steps, the taking of the appeal and the filing of the ancillary bill, are merely continuations of the main case, incidental thereto and dependent thereon. The branches of a tree cannot grow out into space without a trunk and roots to support them. If we are right in this position, then the case of Cohens v. Virginia is decisive of the case at bar.

But it must become apparent, however, that the Eleventh Amendment is not susceptible of the strict construction which the petitioners seek to place upon it. As was said by this Court in Juilliard v. Greenman (Legal Tender case), 110 U. S. 421, l. c. 439:

> "A constitution, establishing a frame of government, declaring fundamental principles, and creating a national sovereignty, and intended to endure for ages and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract."

On the contrary, a law should receive a sensible construction which will carry out the purpose of those by whom it was promulgated and adopted and so as to avoid unjust or absurd results.

In re Chapman, 166 U. S. 661, l. c. 667;
Lau Ow Bew v. United States, 144 U. S. 47, l. c. 59;
Williams v. United States Fidelity & Guaranty Co., 236 U. S. 549, l. c. 555.

In those cases it was stated that:

> "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."

We, therefore, respectfully submit that the entire purpose of the Eleventh Amendment was to obviate the possibility of money judgments being rendered by the federal courts in favor of individual plaintiffs against the states; that it was never intended to be used as a marauding instrument for obtaining judgments and decrees in state tribunals which were contrary to and in conflict with those already rendered by the federal courts with reference to the same subject matter, and that as a result the Eleventh Amendment is entirely inapplicable to the case at bar.

II. Waiver of Immunity.

A second ground urged by the respondents to support the granting of an injunction against the State is that the Eleventh Amendment is not a mandatory enactment, but merely confers a personal privilege which may be waived by the State. The Circuit Court of Appeals, while acknowledging the correctness of the proposition of law as above stated, declined to enforce it in the present case for the assigned reason that the State by its intervention

did not seek to have its alleged right to the inheritance tax claimed by it adjudicated in the federal court, but merely petitioned the federal court to retain the property in its registry pending a determination of the State's right to the tax in the state courts (R. 27, 28); that therefore the State did not submit to the jurisdiction of the federal court and did not waive its right to immunity.

Although the Circuit Court of Appeals, as aforesaid, decided against the respondents herein on the foregoing ground, it is still open for consideration by this Court because the entire record is before this Court, and we urge the additional ground in order to sustain the judgment of the Circuit Court of Appeals and not for the purpose of overthrowing it.

> Story Parchment Company v. Paterson Parchment Paper Company et al., 282 U. S. 555, l. c. 560; Langnes v. Green, 282 U. S. 531, l. c. 536-7.

We, therefore, proceed to an examination of the authorities which we believe justify the issuance of the injunction sought in the ancillary bill of complaint, even though the Eleventh Amendment may be applicable to the case.

In the leading case of Clark v. Barnard et al., 108 U. S. 436, the Court said, at pages 447-48:

> "The first question for determination on this appeal is that of jurisdiction, raised first by the demurrer and afterwards by the answer of Clark, General Treasurer of the State of Rhode Island, on the ground that

the suit was, in effect, brought against the state by a citizen of another state, contrary to the Eleventh Amendment to the Constitution of the United States.

"We are relieved, however, from its consideration by the voluntary appearance of the state in intervening as a claimant of the fund in court. The immunity from suit belonging to a state which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction; while, of course, those courts are always open to it as a suitor in controversies between it and citizens of other states. In the present case the State of Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination." (Emphasis ours.)

That case was cited with approval in Gunter v. Atlantic Coast Line Railroad Company, 200 U. S. 273, where the following language appears at page 284:

"c. Although a state may not be sued without its consent, such immunity is a privilege which may be waived, and hence where a state voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking

the prohibitions of the Eleventh Amendment (Clark v. Barnard, 108 U. S. 436, 447)."

At pages 291-2 the Court continued:

"Third. It is insisted that the court below had no power to restrain the Attorney-General of South Carolina and the counsel associated with him from prosecuting in the state courts actions authorized by the laws of the state, and hence that the Court erred in awarding an injunction against said officers. Support for the proposition is rested upon the terms of the Eleventh Amendment and the provisions of Section 720 of the Revised Statutes, forbidding the granting of a writ by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. The soundness of the doctrine relied upon is undoubted (*In re Ayers*, 123 U. S. 443; *Fitts v. McGhee*, 172 U. S. 516). The difficulty is that the doctrine is inapplicable to this case. Section 720 of the Revised Statutes was originally adopted in 1793, whilst the Eleventh Amendment was in process of formation in Congress for submission to the states, and long, therefore, before the ratification of that amendment. The restrictions embodied in the section were, therefore, but a partial accomplishment of the same comprehensive result effectuated by the prohibitions of the Eleventh Amendment. Both the statute and the amendment relate to the power of courts of the United States to deal, against the will and consent of a state, with controversies between it and individuals. None of the prohibitions, therefore, of the amendment or of the

statute relate to the power of a federal court to administer relief in causes where **jurisdiction** as to a state and its officers **has been acquired as a result of the voluntary action of the state in submitting its rights to judicial determination.**" (Emphasis ours.)

A statement of the doctrine very appropriate to the point here in issue is found in the case of Cunningham v. Macon & Brunswick Railroad Company et al., 109 U. S. 446, at pages 451-2:

"1. It has been held in a class of cases where property of the state, or property in which the state has an interest, comes before the Court and under its control, in the regular course of judicial administration, without being forcibly taken from the possession of the Government, the Court will proceed to discharge its duty in regard to that property. And the state, if it chose to come in as plaintiff, as in prize cases, **or to intervene in other cases when she may have a lien or other claim on the property,** will be permitted to do so, but subject to the rule that her rights will receive the same consideration as any other party interested in the matter, and be subjected in like manner to the judgment of the Court. Of this class are the cases of *The Siren,* 7 Wall. 152, 157; *The Davis,* 10 Wall. 15, 20, and *Clark v. Barnard and Others,* 108 U. S." (Emphasis ours.)

The question which must be determined, therefore, is whether or not the action of the State in intervening in the litigation in the District Court was such that it constitued

a waiver of the privilege of immunity from suit conferred by the Eleventh Amendment.

The motion of the State to intervene contains the following language:

> "Comes now Stratton Shartel, Attorney-General of the State of Missouri, and for and in behalf of the State of Missouri moves the Court to permit the State of Missouri to intervene **as a party defendant in this cause.** * * *" (R. 2). (Emphasis ours.)

The said motion of the state for leave to intervene then sets forth that 188,333⅓ shares of the stock of Burroughs Adding Machine Company belonged to the estate of Sophie Franz, deceased, and that the same is subject to the inheritance tax of Missouri, and that upon the death of Sophie Franz the State of Missouri "acquired a lien upon all property belonging to said Sophie Franz at her death." The motion to intervene then stated:

> "That it is necessary to protect the interests of the State of Missouri in the assessment and collection of inheritance taxes upon all property belonging to said Sophie Franz at her death, that the State of Missouri be **permitted to intervene as a party defendant herein**, so that it may file proper pleading in opposition to the motions of Gustavus A. Buder and Gustav A. Franz, trustees, and Johanna F. Fiske, Amanda F. Wheeler, Otto B. Franz, Henrietta Holdoway, Adelaide Zimmerman, Sherman H. Kleinschmidt and Helen Kleinschmidt * * *" (R. 4). (Emphasis ours.)

The motion of the state to intervene then contained this language:

> "Wherefore, this applicant prays that he be permitted to **intervene as a party defendant** in this cause and to file such pleading and **offer such proof** as is necessary to protect its rights, and that an order be entered **making the State of Missouri a party defendant herein**" (R. 4). (Emphasis ours.)

Thus it will be seen that the application and intention of the State was to intervene as a party defendant in an unlimited sense for the purpose of asserting and establishing a lien on specific stock held by the trustees, subject to the jurisdiction of the District Court. In no sense did the State, through its representatives, seek to intervene in a special or limited form. Its representatives did not merely seek permission to file suggestions. The intervention was not *pro interesse suo,* but was a general intervention as a party defendant to contest the title of these appellants to said Burroughs Adding Machine stock and to assert and establish the lien of the State on said specific stock. The entry of the State of Missouri into this litigation was without restraint or qualification in either form or substance.

The order of the Court granted the State of Missouri leave to intervene as a defendant, in which order it was stated:

"It is ordered that said application be, and the same is hereby, granted, and the said petitioner is allowed five days from this date within which to file its formal intervening petition" (R. 2).

Thereupon, on June 6, 1931, the intervening petition of the State of Missouri was filed, in which petition the State alleged:

"Comes now Stratton Shartel, Attorney-General of the State of Missouri, and for and in behalf of the State of Missouri, for its intervening petition states * * *."

It was then alleged in said intervening petition that these remaindermen (respondents herein) had, by "diverse acts and by pleadings filed in this cause, extinguished, transferred and assigned their remainder interest to the life tenant, Sophie Franz" (R. 5).

The intervening petition further states:

"**That said stock**, except that portion thereof which belongs to plaintiff, the estate of Walter G. Franz, the estate of Ernest H. Franz and Eleanor Kleinschmidt, **was owned by Sophie Franz** at her death, should have been inventoried, and is subject to the assessment and collection of inheritance taxes of the State of Missouri under the terms of the will of the said Sophie Franz, deceased, and the State of Missouri since the date of the death of said Sophie Franz, to wit, May 13, 1920, **has had and now has a lien upon said stock** for said taxes" (R. 5-6). (Emphasis ours.)

The intervening petition further states:

> "That the Circuit Attorney of the City of St. Louis, Missouri, **pursuant to the Inheritance Tax Law of said state**, has made application for the issuance of a citation in the estate of Sophie Franz, deceased, against the executor thereof to require him to inventory said stock. That said citation has been served and is returnable on June 12, 1931. That the Attorney-General, **pursuant to request from the Treasurer of the State of Missouri**, has entered his appearance in said proceeding to assist the Circuit Attorney therein" (R. 6).

Thus, the State of Missouri not only intervened as a party defendant, without limitation or qualification, but the State of Missouri, in its intervening petition, asserts a direct interest in and a lien upon the Burroughs Adding Machine stock, which is the subject matter of the suit.

How could the State hope to obtain the relief prayed for in its intervening petition without establishing an interest in the subject matter sufficient to justify the District Court in impounding the Burroughs stock? How did the State hope to establish that requisite interest in the subject matter unless it did in fact submit its rights to judicial determination in the District Court?

It is fundamental that an intervenor must have a direct interest or lien upon the property which is the subject matter of the suit, and that such interest must be made to appear from the allegations of the intervening petition.

Smith v. Gale, 144 U. S. 509, l. c. 518-19;

Aronstam v. James et al., 273 Fed. 545, l. c. 547;
Glass v. Woodman et al., 223 Fed. 621.

In recognition of the doctrine the State of Missouri fully alleged its interest in this subject matter of the suit and submitted, without reservation, its rights for judicial determination in this court. It alleges that the appellants, "prior to the entry of said decree, by divers acts and by pleadings filed in this cause, extinguished, transferred and assigned their remainder interest to the life tenant, Sophie Franz"; that said stock was owned by Sophie Franz at her death, should have been inventoried and is subject to the assessment and collection of inheritance taxes of the State of Missouri under the terms of the will of Sophie Franz, deceased.

It was necessary for the State of Missouri to submit its alleged rights for judicial determination, **in order to establish its right to intervene and to enforce a lien.** Had it failed to do so, the intervention could not be sustained. We respectfully submit that the State of Missouri, having adopted this course, will not be heard to say that its rights or interests will be presumed as a matter of course and that property of others will be ordered paid in the registry of the District Court to await determination concerning the merit of the State's claim. If the State desires such affirmative relief, it must, as any other litigant, and as it attempted in this case, allege the basis therefor and prove its right thereto. It would be paradoxical to assert that the State could intervene in a cause such as the pres-

ent case without submitting and subjecting its alleged rights to judicial determination by this Court.

By prosecuting in the lower court its claim that it has a lien upon certain stock, which has been the subject matter of this suit, the State of Missouri comes into this litigation to such a full extent that the doctrine of Clark v. Barnard, 108 U. S. 436, Gunter v. Atlantic Coast Line, 200 U. S. 273, and Cunningham v. Macon Railway Company, 109 U. S. 446, hereinabove cited, is most appropriate and peculiarly applicable.

Even assuming that the State had desired and had intended to reserve the question of its alleged right to the inheritance tax for judicial determination in the Probate Court of the City of St. Louis, it could not have done so for the reason that the property upon which the tax was sought was in the custody of the United States District Court for the Eastern District of Missouri, and that therefore any question of the validity of the tax claimed by the State could be heard and determined only in that court.

We quote as follows from In re Tyler, 149 U. S. 164, l. c. 182 and 183:

> "The general doctrine that property in the possession of a receiver appointed by a court is *in custodia legis,* and that unauthorized interference with such possession is punishable as a contempt, is conceded; but it is contended that this salutary rule has no application to the collection of taxes. Undoubtedly prop-

erty so situated is not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever, except judicial costs, when the property is rightfully in the custody of the law, **but this does not justify a physical invasion of such custody and a wanton disregard of the orders of the Court in respect of it.** The maintenance of the system of checks and balances characteristic of republican institutions requires the co-ordinate departments of government, whether federal or state, to refrain from any infringement of the independence of each other, and **the possession of property by the judicial department cannot be arbitrarily encroached upon,** save in violation of this fundamental principle.

"The levy of a tax warrant, like the levy of an ordinary *fieri facias,* sequestrates the property to answer the exigency of the writ; but property in the possession of the receiver is already in sequestration, already held in equitable execution, and while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the Court. It is the duty of the Court to see to it that this is done; and a seizure of the property against its will can only be predicated upon the assumption that the Court will fail in the discharge of its duty, an assumption carrying a contempt upon its face." (Emphasis ours.)

The foregoing authority is directly applicable in the instant case for the reason that when the main litigation was first before the Circuit Court of Appeals that tribunal held (Franz v. Buder, 11 Fed. [2nd] 854, l. c. 859) that

the case was in the nature of an action *in rem* and that it involved "the potential necessity of assuming control of that property for the purpose of enforcing any decree that may be rendered, and of preventing any disposition of the property that may impair the efficacy of that decree" (R. 29). That adjudication became the law of the case, and was accepted and adopted by the State of Missouri, for it made said ruling binding upon itself by intervening in the case.

French v. Capen, 105 U. S. 509, l. c. 525;
Commercial Electrical Supply Company v. Curtis et al., 288 Fed. 657, l. c. 659;
Rice et al. v. Durham Water Co., 91 Fed. 433, l. c. 434.

There can be little question that the State was fully and completely bound by the action of its Attorney-General in intervening in the main litigation and is, therefore, bound by his waiver of the provisions of the amendment.

Section 11276, R. S. Mo. 1929, provides as follows:

"The Attorney-General shall institute, in the name and on behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, and enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary; **and he may also appear and interplead, answer or defend, in any proceeding or tribunal in which the state's interests are involved.**" (Emphasis ours.)

Further, **Section 590, R. S. Mo. 1929**, on the specific subject of inheritance tax, provides:

> "The Prosecuting Attorney shall represent the state at all hearings, proceedings and trials under the provisions of this law in the probate and circuit courts, and **the Attorney-General shall, at the request of the State Treasurer, assist the Prosecuting Attorney in any such hearing, proceeding or trial and shall appear for and represent the state in any appeal or proceeding in the Supreme or Appellate Courts of this state, and in any case in the federal courts.**" (Emphasis ours.)

In this connection it will be noted that the intervening petition of the State of Missouri expressly recites:

> "That the Attorney-General, pursuant to request from the Treasurer of the State of Missouri, has entered his appearance in said proceedings to assist the Circuit Attorney therein" (R. 6).

The foregoing statutes are germane to the issue under consideration for the reason that the question whether a state has given its consent to be sued is determinable under the local state law of the particular state.

> Palmer v. State of Ohio, 248 U. S. 32;
> O'Connor v. Slaker, 22 Fed. (2nd) 147, l. c. 152-3.

The right of a State Attorney-General to waive the immunity from suit in behalf of his state arises from "a

statute having special reference to the subject matter of the suit and conferring power upon the official to appear for and represent the state."

> Bow v. Plummer, 79 New Hampshire 23, l. c. 25 (citing as authority for the foregoing enunciation Gunter v. Atlantic Coast Line Railroad Company, 200 U. S. 273, and Clark v. Barnard, 108 U. S. 436).

In view of Section 590, R. S. Mo. 1929, it is difficult to conceive of a case coming more squarely within the rule than the one under consideration. When the Legislature of the State of Missouri provided, as part and parcel of the Inheritance Tax Law of the State, that the "Attorney-General shall, at the request of the State Treasurer, assist the Prosecuting Attorney in any such hearing, proceeding or trial, and **shall appear for and represent the state** in any appeal or proceeding in the Supreme or Appellate Courts of the state, and **in any case in the federal courts**". (emphasis ours), it did everything humanly possible to render the act of the Attorney-General the act of the State itself when he enters litigation in the federal courts as he did in the instant case.

III. Conclusion.

To recapitulate, the position of the respondents is as follows:

First, the Eleventh Amendment to the Constitution of

the United States is entirely without application in this case because, in entertaining the supplemental bill for an injunction, the District Court would merely have been acting in a manner ancillary to a decree theretofore rendered, in order to protect its own jurisdiction, against which there is no constitutional inhibition.

Second, irrespective of the preceding point, and assuming that the Eleventh Amendment was applicable to the case at bar, the privilege thereby conferred was waived by the filing of the intervening petition by the State, because (a) the intervention was one which submitted the rights of the State for judicial determination, in order that its claim to an alleged lien on property within the custody of the District Court might be enforced, and (b) the Attorney-General of the State possessed, under the Missouri statutes, full, complete and absolute authority to bind the State by entering the case as an intervenor.

In the event our position with reference to either of the foregoing contentions is well taken, the judgment of the Court of Appeals should be affirmed and that of the District Court reversed.

If, however, this Court should for any reason disagree with both of the foregoing independent contentions, and should come to the conclusion that the judgment of the Court of Appeals should be reversed on a technical legal theory concerning the Eleventh Amendment, we most respectfully suggest that then the opinion of this Court should be confined to the question of law concerning the

suability of a state at the instance of a private individual and should not extend further so it may be seized upon to bolster up the State's alleged claim to an inheritance tax or so as to affect the question of the rights of the parties in regard to the ultimate distribution of the Burroughs Adding Machine Company stock. We offer the foregoing suggestion because the respondents herein have filed motions for the distribution of their interests in the property in question (R. 24), and there is pending before the United States Circuit Court of Appeals for the Eighth Circuit cause No. 9630, which is an appeal from the order of the District Court entered upon said petitions for distribution. Said cause was argued and submitted on March 21, 1933, but has not yet been decided, and we are constrained to believe (due to the customary promptness of that tribunal in disposing of matters before it) that said Court is withholding a decision in that matter because of a desire to defer, if necessary, to the decision of this Court in the present matter. In view of the fact that the lower court has, as heretofore mentioned, custody of the property in question, said court, rather than a state court, should order a proper distribution of such property. This is rendered clear by the following excerpt from the case of Covell v. Heyman, 111 U. S. 176, l. c. 182 and 183:

> "The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by

avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; **but between state courts and those of the United States, it is something more. It is a principle of right and of law, and, therefore, of necessity. It leaves nothing to discretion or mere convenience.** These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they coexist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and **when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty.** To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues. **'The jurisdiction of a court,'** said Chief Justice Marshall, **'is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied.** Many questions arise on the process, subsequent to the judgment, in which jurisdiction is to be exercised' (*Wayman v. Southard*, 10 Wheat. 1)." (Emphasis ours.)

The Covell case is frequently invoked as authority. Within comparatively recent years the foregoing quotation was approvingly cited by the late lamented Mr. Chief Justice Taft in the case of Ponzi v. Fessenden et al., 258 U. S. 254, l. c. 260 and 261.

In the interest of a clear understanding, we desire to state that there is every reason to believe that even if the State's claim to an inheritance tax were adjudicated in the state courts, the result would be the same as in the federal courts, because the rule adopted by the Missouri courts in regard to stock dividends is the same as that applied by the Court of Appeals in the present litigation in Franz v. Buder, 27 Fed. (2nd) 101. (In this connection see Hayes v. St. Louis Union Trust Company, 298 S. W. 91, l. c. 98.) We, therefore, have no apprehension concerning the ultimate outcome of the inheritance tax controversy, but what we are most desirous of avoiding is any further undue or unnecessary delay in disposing of the matter. According to repeated adjudications by the Circuit Court of Appeals (R. 29-30), the property in question should have been distributed to these respondents immediately upon the death of Sophie Franz, the life tenant, which occurred on April 14, 1930 (R. 10). The accomplishment of a proper distribution of the property has already been delayed for more than two and one-half years because of the State injecting its fancied claim to an inheritance tax, and it would be unjust and inequitable to defer action for an additional period ranging between three and six years until the state courts of Missouri had threshed out the same question which has already been finally and conclusively disposed of by the United States District Court for the Eastern District of Missouri and by the Circuit Court of Appeals for the Eighth Circuit.

It is, therefore, respectfully submitted that both legal and moral justice, and practical as well as theoretical considerations, commend the affirmance of the decree of the Circuit Court of Appeals.

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